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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

IN EQUITY.

No. 831

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, A CORPORATION,

vs. *Plaintiff,*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

AND *Defendants,*

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Intervening Defendants.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant in support of jurisdiction of the Supreme Court of the United States to review the above entitled

case on appeal and in compliance with Rule 12 of the Rules of the Supreme Court, respectfully represents:

(A) Statutory Provisions Sustaining Jurisdiction.

It is provided in Section 47 of Title 28, United States Code (Chapter 32, 38 Stat. L. 220), that an action may be brought to set aside, in whole or in part, any order made or entered by the Interstate Commerce Commission by petition to any District Court of the United States, and that the judge of such District Court shall immediately call to his assistance to hear and determine the matter two other judges, one of whom shall be a Circuit Judge. This section also provides that an appeal may be taken direct to the Supreme Court of the United States.

Section 47a of Title 28, United States Code (Judicial Code, Section 210, Chapter 32, 38 Stat. L. 220), provides as follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

It is also provided in Section 345 of Title 28, United States Code (Judicial Code, Section 238, Amended, Chapter 426, 48 Stat. L. 926), that a direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had in certain classes of cases, including:

> "suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

(B) Decree.

The decree sought to be reviewed herein was entered March 23, 1937.

The petition for appeal was filed and the order allowing the appeal was entered May 3, 1937.

(C) Nature of the Case and Ruling of the District Court.

This suit was brought by the appellant Escanaba and Lake Superior Railroad Company, under authority of an Act of Congress approved October 22, 1913, 38 Stat. L. 219 (28 U. S. C. A., Sec. 41, Subsections 45, 46, 47), for the purpose of suspending, enjoining, setting aside and annulling a certain order of the Interstate Commerce Commission issued by that body on the 18th of November, 1936, in a proceeding before it known as No. 26903, and also for the purpose of enjoining, setting aside and annulling a certain certificate, issued by said Interstate Commerce Commission on the same date in a proceeding before it known as Finance Docket No. 11025. Very briefly, said order and certificate authorized the pooling of iron-ore traffic from the Menominee Range to the docks at Escanaba, Michigan, the pooling of the revennes therefrom, the expenses thereof, and of the tracks, equipment, facilities and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and plaintiff Escanaba and Lake Superior Railroad Company at Channing and Escanaba, Michigan; and the abandonment by the Chicago, Milwaukee, St. Paul and Pacific Railroad (hereinafter called the Milwaukee road) of its operations under trackage rights for transportation of iron ore over the line of plaintiff Esca-

naba and Lake Superior Railroad Company from Channing, Michigan, to Escanaba, Michigan.

The proceedings before the Commission were initiated by a petition filed March 12, 1935, by the Milwaukee road, the Chicago and North Western Railway Company (hereinafter called the North Western Line), and a non-operating subsidiary of the latter known as Escanaba, Iron Mountain and Western Railroad Company, docketed as No. 26903, under which applicants sought an order under paragraph (1) of Section 5, of the Interstate Commerce Act authorizing substantially the foregoing described pooling arrangement. The application was denied in a report (210 I. C. C. 599) and order entered September 24, 1935, without prejudice to a renewal of the application if and when the Milwaukee road procured a certificate of convenience and necessity under paragraph (18) of Section 1 of the Act for the abandonment of certain operations contemplated by the pooling plan. Thereafter, over the protest of plaintiff, the aforesaid proceeding under Docket No. 26903 was re-opened, by order of the Commission entered February 8, 1936.

Prior to such re-opening, the Milwaukee road had filed with the Commission on November 29, 1935, its contingent application under paragraph (18) of Section 1 for a certificate of public convenience and necessity seeking permission for abandonment of operation, undertrackage rights, over the line owned by the Escanaba and Lake Superior Railroad Company between Channing and Escanaba, Michigan, and for an order authorizing pooled use and operation of certain tracks and facilities in Michigan and Wisconsin, which was docketed by the Commission as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition.

Thereafter, the Commission conducted further hearings on the two applications which were heard on one record, and

on November 18, 1936, issued its report entitled in No. 26903 and embracing said Finance Docket No. 11025. The aforesaid order and certificate, herein sought to be set aside, were attached to said report.

The Escanaba and Lake Superior Railroad, extends from Escanaba where it joins the North Western Line, in a northwesterly direction 63 miles to Channing, Michigan, where it joins the line of the Milwaukee road. The section of the road extending from Escanaba to Watson, Michigan, 31 miles, was constructed prior to 1900, and primarily as a logging railroad. The Company was incorporated February 12, 1900, and in that year the western 32 miles from Watson to Channing, was constructed primarily for the transportation of iron ore and the entire line was reconstructed with heavier materials for the sake of the iron ore traffic. This was under a contract between the plaintiff and the Milwaukee road entered into in 1900 and expiring December 31, 1920. A new agreement, expiring January 1, 1951, was then made substantially in extension of the original agreement. Since the year 1900, the Milwaukee Road has run in ore trains from the Menominee Range via Channing over the line of railway owned and maintained by the Escanaba and Lake Superior Railroad Company.

The North Western Line also has been a very large carrier of iron ore from the Menominee Range, which moves over its line to Iron Mountain, Michigan, and thence eastward to Escanaba over a line owned by Escanaba, Iron Mountain and Western Railroad, the latter being merely a lessor and strictly non-operating company.

The Milwaukee Road ore docks becoming out of repair in 1932, the Milwaukee and North Western officials privately discussed the feasibility of a plan of pooling the ore traffic, of which the public and the Escanaba and Lake Superior Railroad had no knowledge until the aforesaid application was filed with the Commission.

The plaintiff in addition to being involved and interested in the ore traffic as indicated above, also interchanges with each of the applicants a large volume of general traffic other than ore on which joint rates are applicable; the plaintiff's revenues on this general traffic approximated $138,000, in the year 1935, which is representative; and the earnings of the Milwaukee and North Western thereon approximate $300,000 per annum. The agreement between the applicants which the Commission has approved, provides for the pooling of all of this joint traffic in which the Escanaba and Lake Superior Railroad Company is a participant in the rates and in transportation; and plaintiff has not consented thereto.

Nevertheless the said Commission found in its aforesaid report that the Escanaba and Lake Superior Railroad Company is not "a carrier involved" within the meaning of Section 5 (1) of the interstate Commerce Act; that "the carriers involved" in said pooling arrangement are the carriers who are parties to the pooling agreement; that none of the plaintiff's traffic or earnings are to be pooled and it is not a party to the pooling agreement and that therefore plaintiff's assent to the pooling was not necessary under Section 5 (1) of the Interstate Commerce Act; that "the Escanaba and Lake Superior Railroad is involved in the ore traffic as an active carrier and not as a mere non-operating concern, to the extent that its officers supervise and its employees do all the work of maintaining the tracks and road bed and dispatch the ore trains and regulate their movements and it receives operating revenues from the ore traffic and that said railroad is a participant in other general traffic covered by said pooling agreement in that as to such traffic said carrier joins in the rates, divisions, and earnings and in the complete physical transportation and that this is true regarding the traffic as it moves today and

that it will be true as to traffic which will move under the pooling plan, by which the earnings are to be divided between the carriers on fixed percentages provided in the agreement.

Similarly, in spite of the showing that if the pooling plan became effective, it meant the abandonment of the Escanaba and Lake Superior Railroad as to one of the primary uses for which that railroad was constructed and the discontinuance of one of its primary functions; that the probable result would be the abandonment of all operations over the major portion of that line, because the same would not be self-supporting without the ore traffic and that that would be detrimental to the public interest and against the convenience and necessity of communities in Delta, Marquette and Dickinson Counties of Upper Michigan, the Commission issued its certificate, as aforesaid, authorizing the contemplated abandonment.

On December 22, 1936, appellant filed in the District Court its petition seeking to enjoin, set aside and annul the aforesaid order and certificate of the Commission.

Hearing in the Ditsrict Court was had before a stautory court of three judges, findings of fact and conclusions of law were made by the court, the conclusion of the court being that the certificate and order complained of find adequate support in the record and that the prayer of the petition of the Escanaba and Lake Superior Railroad Company should be denied.

The questions presented by this appeal involve the correctness of the refusal of the Statutory Court to enjoin, set aside and annul the order and certificate of the Commission; the correctness of the court's conclusion that the Commission's issuance of its aforesaid order of November 18, 1936, is within its authority under Section 5 (1) of the Interstate Commerce Act; that the Escanaba and Lake Superior Railroad Company is not a carrier involved in the pooling ar-

rangement approved by that order; that the carriers involved in said pooling arrangement are the carriers who are parties to the pooling agreement; that none of the Escanaba and Lake Superior Railroad Company's traffic and none of its earnings are to be pooled and it is not a party to the pooling agreement and that, therefore, its assent to the pooling which is wholly between the Milwaukee road and the North Western Line is not necessary under Section 5 (1) of the Act. There is also involved the correctness of the conclusion and finding of the District Court that as a matter of law the Commission's said certificate that public convenience and necessity permit the abandonment by the Milwaukee Road of operation under trackage rights over the line between Channing and Escanaba is within the Commission's authority under Section 1 (18), (19) and (20) of the Interstate Commerce Act and in holding and concluding as a matter of law that in making the certificate and order approving the pooling arrangements, the Interstate Commerce Commission committed no error of law and that both are valid. It is submitted that these questions are substantial and important.

(D) Cases Sustaining Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

The Chicago Junction Case, 264 U. S. 258, 68 L. Ed. 667;

Claiborne-Annapolis Ferry Co. v. *United States*, 285 U. S. 382, 76 L. Ed. 809;

Powell v. *United States*, — U. S. —, 81 L. Ed. (Adv. Ips.) 423, decided March 1, 1937;

Virginian Railway Co. v. *United States*, 272 U. S. 658, 71 L. Ed. 463;

Beaumont, Sour Lake & Western Railway Co. v. *United States*, 282 U. S. 74, 75 L. Ed. 221;

New England Divisions Case, 261 U. S. 184, 67 L. Ed. 605;

The Los Angeles Switching Case, 234 U. S. 294, 58 L. Ed. 1319;

Merchants Warehouse Co. v. United States, 284 U. S. 501, 75 L. Ed. 1227.

JOHN S. BURCHMORE,
CLARK M. ROBERTSON,
Solicitors for Escanaba and Lake Superior Railroad Company.

APPENDIX.

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION.

In Equity.

No. 831.

Escanaba & Lake Superior Railroad Company, a Corporation, *Plaintiff*,

v.

United States of America and Interstate Commerce Commission, *Defendants;* and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, *Intervening Defendants.*

Before Simons, Circuit Judge, and Moinet and Raymond, District Judges.

Raymond, *District Judge:*

Plaintiff seeks under the authority of 28 U. S. C., secs. 41 (par. 28), 45, 46 and 47, to enjoin an order and certificate of the Interstate Commerce Commission entered November 18, 1936. The Commission's report issued therewith is found in 219 I. C. C. 285. That report and the findings of fact accompanying this opinion sufficiently state the relationship of the parties and the course of the litigation. Upon oral argument counsel agreed that the issues here for consideration are greatly restricted by the provisions of the Transportation Act of 1920 which introduced into Federal legislation a new railroad policy and vested the Commission with extensive powers and discretion beyond the scope of review by the courts. (See New England Divisions Case, 261 U. S. 184, 189; Texas & Pacific Railway Co. *v.* Gulf, etc. Railway Co., 270 U. S. 266, 277; and Colorado *v.* United States, 271 U. S. 153, 162, 163.)

In general, the order and certificate complained of authorize the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba, Michigan, the pooling of the revenues therefrom, the expenses thereof, and of the tracks, equipment, facilities and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and the plaintiff at Channing and Escanaba; and the abandonment by the Milwaukee road of its operations under trackage rights for transportation of iron ore over the line of plaintiff's railway from Channing, Michigan, to Escanaba.

Plaintiff urges that the record contains no substantial testimony tending to prove that competition will not be unduly restrained by the pooling of traffic in iron ore; that there is no evidence to support findings sustaining the pooling of class or commodity traffic; that there is no substantial evidence warranting the commission's finding that public convenience and necessity permit abandonment of the operation by the Milwaukee road of plaintiff's railway line from Channing to Escanaba under the agreement for trackage rights, and argues that the overwhelming preponderance of the evidence is that the direct probable results of such abandonment will be serious injury and detriment to the public. Plaintiff also insists that the Commission's jurisdiction to authorize the pooling of freight by railroad is expressly limited by the requirement of paragraph 1 of sec. 5 of the act that division of traffic or earnings shall be assented to by all the carriers involved; that it is a carrier involved, and that its assent has not been given.

The binding effect of fact findings by the Commission and the limitations upon the power of the courts to disturb them have been so frequently noted that restatement is not required. See Pittsburgh & W. V. Railway Co. *v.* United States, 41 F. (2d) 806, 808. It is clear that courts may not consider the weight of the evidence or the wisdom of the order made provided there is evidence to sustain it.

The courts accord to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience". (See Illinois Central Railroad Co., et al. *v.* Interstate Commerce Commission, 206 U. S. 441.) In the instant case, the Commission found that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the pooling agreement; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable. Examination of the record is convincing that there is substantial evidence to support these findings. It is true that the applicants did not upon some issues produce all of the available evidence; that some of the evidence was of the kind commonly designated as opinion or expert evidence given by employees of some of the interested parties; and that other evidence was indirect or circumstantial. But these considerations do not warrant its rejection in determining whether or not there was more than a mere scintilla of evidence before the Commission. Such evidence is commonly accepted as convincing even in criminal trials. Against the admitted loss and inconvenience to the communities along the line of plaintiff's railroad, the Commission was charged with the responsibility of weighing the loss and inconvenience to the larger general public—national in scope. Under repeated decisions, we have no right to weigh this evidence to determine whether our conclusions thereon would differ from those of the Commission.

It is important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the transportation of iron ore. Continuance by plaintiff of operation by the railroad is in no way limited. The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables

the Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The conclusion of the court is that the certificate and order complained of find adequate support in the record and that the prayer of the petition filed herein should be denied. An order will be entered accordingly.